UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ANGE SAMMA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF DEFENSE and MARK ESPER, in his official capacity as Secretary of Defense, Defendants.	Civil Action No. 1:20-cv-01104-ESH The Honorable Ellen Segal Huvelle

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF CLASS COUNSEL

Defendants, the United States Department of Defense and Secretary of Defense Mark Esper, sued in his official capacity, hereby file this response to Plaintiffs' Motion for Class Certification and Appointment of Class Counsel ("Pls.' Mot."). Defendants oppose Plaintiffs' proposed class definition for the reasons set forth below. First, Plaintiffs' proposed class definition is flawed for multiple reasons. Second, Defendants oppose granting the motion where doing so would afford relief to individuals who are precluded by *res judicata* from bringing a second challenge to the challenged policy in this case or where it would interfere with proceedings in other related litigation.

STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 23(a), putative class representatives are required to show that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will

fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). In addition, they must meet the applicable requirements of Rule 23(b). Here, Plaintiffs are seeking certification under Rule 23(b)(1) and (2). They must accordingly demonstrate that claims brought by individual class members would create a risk of inconsistent or varying adjudications or adjudications that would be dispositive to other class members or would substantially impair their interests ((b)(1)) or that Defendants have acted or refused to act on grounds that apply generally to the purported class ((b)(2)). *Id*.

ARGUMENT

The Court should not certify the class proposed by Plaintiffs for two reasons. First, the proposed class definition offered by Plaintiffs is flawed because it is not properly tailored to the claims that can be sustained by Plaintiff Isiaka, the only named Plaintiff with standing in this case. Among its defects, Plaintiffs' proposed definition seeks to include service members who are not injured by the challenged time-in-service requirements anddoes not describe an ascertainable class. Second, the Court should exclude from any class individuals who have already sought to enjoin the challenged policy, as well as class members from *Kuang v. United States Department of Defense* where entering relief on their behalf in this case would interfere with the proceedings in that case.

I. PLAINTIFFS' CLASS DEFINITION IS FLAWED

Plaintiffs seek an order certifying a class consisting of "all individuals who: (a) are non-citizens serving honorably in the U.S. military; (b) have requested but not received a certified Form N-426, [sic] and (c) are not Selected Reserve MAVNIs covered by the *Kirwa* lawsuit." Pls.' Mot. at 17. This definition suffers multiple defects, each of which is discussed in turn below.

A. Any proposed class can challenge Section I of the October 13, 2017 policy only

It has long been settled law that a class may be certified to bring a cause of action only where the named plaintiffs seeking to represent the class have standing to pursue such a claim. *See, e.g.*, *LoBue v. Christopher*, 82 F.3d 1081, 1085 (D.C. Cir. 1996) ("If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." (quoting *O'Shea v. Littleton*, 414 U.S. 488, 494–95 (1974)). In this case, Plaintiffs are challenging time-in-service requirements that differ depending on the date of a service member's enlistment. For those members who enlisted prior to October 13, 2017, Section II of the policy applies. *See* SAMMA_0008.[1] For those members who enlisted after October 13, 2017, Section I of the policy applies. *See* SAMMA_0007-08. Of six named Plaintiffs in the case, only Plaintiff Isiaka lacks a certified N-426 and therefore has standing to pursue a challenge to the time-in-service requirements in this case. *See* Mem. in Supp. of Defs.' Cross-Mot. for Summ. J. and Opp. to Pls.' Mot. for Summ. J. ("Defs.' MSJ"), ECF No. 19-1, at 13-15. Plaintiff Isiaka, furthermore, enlisted in January 2020, *see* Compl., ECF No. 1, ¶ 21, so Section I of the challenged policy memorandum applies to him. Because Plaintiff Isiaka is the only named Plaintiff who has standing to challenge the time-in-service requirement, the only section of the memoranda that can be challenged by a certified class likewise is Section I.

Plaintiffs' counsel themselves have conceded that only Section I of the policy is at issue in this case. *See* Tr. of 5/5/20 Teleconference, ECF No. 19-3, 3:3-7 (affirming that "the plaintiffs are challenging section one [of the memoranda] only"). The class definition must therefore be

[1] Defendants' references to the certified Administrative Record for this case incorporate the Bates numbering applied to the documents in the Record.

limited to only those service members to whom Section I of the policy applies, *i.e.*, those who enlisted on or after October 13, 2017.

B. Because no named Plaintiff has standing to challenge the O-6 policy, a certified class cannot challenge that policy either

Along with their challenge to the time-in-service requirement in Section I of the policy memoranda, Plaintiffs also challenge Defendants' policy of requiring a commissioned officer in the pay grade of O-6 or higher to certify the N-426 forms. Unlike with the time-in-service requirement, however, *no* named Plaintiff has standing to challenge this policy. Any certified class in this case thus cannot sustain a challenge to the O-6 policy either. *See LoBue*, 82 F.3d at 1085.

As discussed above, five of the six named Plaintiffs now have certified N-426s and therefore lack standing to pursue any claim in this case. Although Plaintiff Isiaka has standing to pursue a challenge to Section I's time-in-service requirement, he has not established standing to challenge the O-6 requirement. *See* Defs.' MSJ at 15 (noting that Plaintiff Isiaka fails to allege any injury from the O-6 requirement or otherwise describe how it harms him). The class definition must accordingly make clear that it extends only to service members who have requested but not received certified N-426s because they have not completed the time-in-service requirement in Section I of the challenged policy memoranda.

C. The class must exclude service members who are no longer being harmed by the challenged time-in-service requirement

Plaintiffs' class definition is further flawed because it is not limited to service members who have not yet met the time-in-service requirements. Specifically, Plaintiffs challenge Defendants' policy of requiring service members seeking N-426 certification to have served for a certain amount of time in order to be eligible. *See* SAMMA 0007-08 (requiring six months for

active-duty service member, twelve months for reservists, and one day of active-duty service for those serving in hazard duty or other specially defined areas). Only those service members who have not yet met this requirement are precluded by operation of the policy from receiving certified N-426s. *See* Tr. of 5/5/20 Teleconference at 15:8-13 ("This is why I think that, if the class turns out to be mainly people who are just being held up for bureaucratic reason and they have complied with everything that they could conceivably do under their policy, they have nothing to complain about, if you would just take care of [the] problem.").

Plaintiffs' proposed class definition, however, is not limited to potential class members who have not yet met the time-in-service requirements, and Plaintiffs incorrectly argue that such proposed class members' injuries arise from the "withholding of N-426 certifications pursuant to the N-426 Policy." *See* Pls.' Mot. at 11. To the contrary, there is a lack of commonality under Rule 23(a)(2) because the claims of Plaintiff Isiaka and proposed class members who satisfy the time-in-service requirement do not arise from the same "uniform policy or practice that affects all class members." *See DL v. Dist. of Columbia*, 713 F.3d 120, 128 (D.C. Cir. 2013). Invalidating the time-in-service requirements would not provide any relief to those service members who meet the requirements. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (holding that the commonality requirement is met where "determination" of the "truth or falsity" of the common claim in the case "will resolve an issue that is central to the validity of each one of the claims in one stroke"). Plaintiffs' proposed class therefore fails the test of Rule 23(a)(2) in this regard.

For the same reasons, those service members who satisfy the time-in-service requirements do not have claims that are "typical" of Plaintiff Isiaka. *See* Fed. R. Civ. P. 23(a)(3). Class members who have satisfied the requirements but have not yet been unable to

obtain certified N-426s are suffering from an injury different to that of Isiaka, who cannot meet the requirements of the October 13, 2017 policy. *See Bynum v. D.C.*, 214 F.R.D. 27, 34 (D.D.C. 2003) ("[T]he typicality requirement focuses on whether the representatives of the class suffered a similar injury from the same course of conduct."); *see also* Tr. of 5/5/20 Teleconference at 16:16-21 ("[T]here is the portion of the group who ought not to be in the case, so to speak, because there is really no—as far as I can tell, there is nothing that is holding them back except somebody doesn't sign off.").

Plaintiffs' proposed class definition thus fails to meet both Rule 23(a)'s commonality and typicality requirements.

D. Plaintiffs' proposed class of all non-citizens who are serving "honorably" is not sufficiently definite

As a final matter, Plaintiffs' proposed class definition's reference to non-citizens serving "honorably" in the military is flawed. Plaintiffs' Complaint in this case challenges the current policy Defendants use for making determinations about who is serving honorably for N-426 purposes, and Plaintiffs seek to invalidate the time-in-service requirement used as part of that determination. Absent the challenged policy, Defendants do not currently have another standard set of criteria to use to make honorable service determinations for N-426 certifications. Plaintiffs' inclusion of the phrase "serving honorably" in the proposed class definition would therefore make the class unascertainable because there would be no way to determine who among the proposed class is currently "serving honorably." *See Thorpe v. D.C.*, 303 F.R.D. 120, 139 (D.D.C. 2014) (noting that the "critical question is whether class membership 'can be ascertained' with reference to 'objective criteria'" (citing Newberg on Class Actions § 3.3)).

II. THE COURT SHOULD NOT CERTIFY A CLASS THAT WOULD INTERFERE WITH RELATED LITIGATION IN OTHER JURISDICTIONS

In addition to addressing the flaws in Plaintiffs' proposed class definition discussion above, the Court should not to certify a class that would interfere with litigation from other jurisdictions. Defendants are aware of two cases in which there is actual or potential overlap with Plaintiffs' proposed class in this case.

First, the Court should not permit the plaintiff in *Kotab v. U.S. Department of the Air Force* to be a class member in this case. Kotab is an LPR who is a reservist in the Air Force, and he brought constitutional and APA challenges to the October 13, 2017 policy memo setting forth criteria for N-426 honorable service determinations. *See Kotab v. U.S. Dep't of Air Force*, No. 2:18-CV-2031-KJD-CWH, 2019 WL 4677020, at *1, *4 (D. Nev. Sept. 25, 2019). The court in that case dismissed the plaintiff's claims, concluding that, among other things, DoD's determination of who serves honorably for N-426 purposes is committed to agency discretion by law. *See id*. at *9-*10. Kotab accordingly cannot be part of a class in this case bringing the same challenges to the same policy. *See Gonzalez-Lora v. U.S. Dep't of Justice*, 169 F. Supp. 3d 46, 52 (D.D.C. 2016) ("Under the doctrine of res judicata (claim preclusion), a final judgment on the merits in a prior suit involving the same parties bars subsequent suits based on the same cause of action." (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, (1979))).

In addition, any certification in this case should not interfere with the proceedings in *Kuang v. United States Department of Defense*, currently pending in the District Court for the Northern District of California. That case concerns a constitutional and APA challenge to another policy memorandum issued on October 13, 2017 that requires LPRs to complete security screening requirements before they are permitted to attend basic training. *See Kuang v. U.S. Dep't of Defense*, 340 F. Supp. 3d 873, 890 (N.D. Cal. 2018). One of the grounds for relief cited

by Plaintiffs in that case is that the challenged policy "disrupt[s] . . . their path to naturalization" by way of their military service. *See* Compl., *Kuang v. U.S. Dep't of Defense*, Case 4:18-cv-03698-JST (N.D. Cal.), ECF No. 1 ¶¶ 93, 100, 107, 118 (identifying this same harm for every claim for relief). The district court in *Kuang* granted the plaintiffs' motion for a preliminary injunction for their claim under §706(2)(A) of the APA, concluding that delay to the naturalization process constituted an irreparable harm. *See Kuang*, 340 F. Supp. 3d at 920-21. In addition, the court certified a class consisting of all persons who (1) are LPRs, (2) have a signed enlistment contract with the U.S. military, and (3) pursuant to the challenged October 13, 2017 policy, have not been permitted to begin basic training pending completion of their security screening. *Id*. at 893. Plaintiffs' counsel in *Samma* represents the *Kuang* class.

On appeal, the Ninth Circuit vacated the district court's preliminary injunction order and remanded the case back to the district court with instructions to dismiss the challenge under § 706(2)(A). *See Kuang v. U.S. Dep't of Defense*, 778 F. App'x 418, 421 (9th Cir. 2019) (concluding that "judicial review is foreclosed" in the case, in part because "military decisions about national security and personnel are inherently sensitive and generally reserved to military discretion"). Given the potential overlap between *Kuang* class and the class Plaintiffs seek to have certified here, the Court must exclude any *Kuang* class members from obtaining any relief in this case to the extent that it overlaps with the relief sought in *Kuang*.

CONCLUSION

For the foregoing reasons, the Court should decline to certify a class using Plaintiffs' proposed class definition. If the Court does grant certification, it should address the flaws in Plaintiffs' proposed definition and exclude the *Kotab* plaintiff and the *Kuang* class from relief where doing so would disturb the rulings in those cases.

Dated: June 1, 2020

Respectfully submitted,

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